

**Letter of Findings Number: 08-0535P
Negligence Penalty
For Tax Year 2008**

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ISSUE

I. Tax Administration–Negligence Penalty.

Authority: IC § 6-3-4-8.1; IC § 6-8.1-5-1; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of ten percent negligence penalties.

STATEMENT OF FACTS

Taxpayer is a corporation doing business in Indiana and across the nation. Beginning on January 1, 2008, taxpayers with monthly liabilities of five thousand (5,000) dollars or more were required to file their payments via Electronic Funds Transfer (EFT). Failure to file by EFT carried a ten (10) percent negligence penalty. Taxpayer was required to file via EFT, but failed to do so for the first three months of 2008. The Indiana Department of Revenue ("Department") issued proposed assessments for ten percent negligence penalty on each monthly payment not made via EFT. Taxpayer protests the imposition of penalty. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Tax Administration–Negligence Penalty.

DISCUSSION

Taxpayer protests the Department's determination to impose ten percent penalty on three monthly withholding tax payments for the first three months of 2008. Those payments were more than five thousand dollars each and were not sent via EFT. Taxpayer states that it acted reasonably and that the Department received all of the taxes due in a timely manner. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

The Department based its assessments on IC § 6-3-4-8.1, which states:

(a) Any entity that is required to file a monthly return and make a monthly remittance of taxes under sections 8, 12, 13, and 15 of this chapter shall file those returns and make those remittances twenty (20) days (rather than thirty (30) days) after the end of each month for which those returns and remittances are filed, if that entity's average monthly remittance for the immediately preceding calendar year exceeds one thousand dollars (\$1,000).

(b) The department may require any entity to make the entity's monthly remittance and file the entity's monthly return twenty (20) days (rather than thirty (30) days) after the end of each month for which a return and payment are made if the department estimates that the entity's average monthly payment for the current calendar year will exceed one thousand dollars (\$1,000).

(c) If the department determines that a withholding agent is not withholding, reporting, or remitting an amount of tax in accordance with this chapter, the department may require the withholding agent:

(1) to make periodic deposits during the reporting period; and

(2) to file an informational return with each periodic deposit.

(d) If a person files a combined sales and withholding tax report and either this section or [IC 6-2.5-6-1](#) requires the sales or withholding tax report to be filed and remittances to be made within twenty (20) days after the end of each month, then the person shall file the combined report and remit the sales and withholding taxes due within twenty (20) days after the end of each month.

(e) If the department determines that an entity's:

(1) estimated monthly withholding tax remittance for the current year; or

(2) average monthly withholding tax remittance for the preceding year; exceeds five thousand dollars (\$5,000), the entity shall remit the monthly withholding taxes due by electronic fund transfer (as defined in [IC 4-8.1-2-7](#)) or by delivering in person or by overnight courier a payment by cashier's check, certified check, or money order to the department. The transfer or payment shall be made on or before the date the remittance is due.

(f) If an entity's withholding tax remittance is made by electronic fund transfer, the entity is not required to file a monthly withholding tax return.

(Emphasis added).

In this case, Taxpayer's average monthly withholding tax remittance for the preceding year and estimated monthly withholding remittance for the current year exceeded five thousand dollars and therefore Taxpayer was required to remit the taxes by EFT or by delivering a cashier's check, certified check, or money order in person or

by overnight courier. Taxpayer did not remit by EFT for January, February, and March of 2008. Taxpayer remitted the taxes by check, but there is no evidence that the checks were cashier's checks, certified checks, or money orders, delivered in person or by overnight courier as required by IC § 6-3-4-8.1(e).

The Department refers to IC § 6-8.1-10-2.1, which states in relevant part:

(a) If a person:

- (1) fails to file a return for any of the listed taxes;
- (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
- (3) incurs, upon examination by the department, a deficiency that is due to negligence;
- (4) fails to timely remit any tax held in trust for the state; or
- (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department;

the person is subject to a penalty.

(b) Except as provided in subsection (g), the penalty described in subsection (a) is ten percent (10[percent]) of:

- (1) the full amount of the tax due if the person failed to file the return;
- (2) the amount of the tax not paid, if the person filed the return but failed to pay the full amount of the tax shown on the return;
- (3) the amount of the tax held in trust that is not timely remitted;
- (4) the amount of deficiency as finally determined by the department; or
- (5) the amount of tax due if a person failed to make payment by electronic funds transfer, overnight courier, or personal delivery by the due date.

(c) For purposes of this section, the filing of a substantially blank or unsigned return does not constitute a return.

(d) If a person subject to the penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit tax held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty.

(e) A person who wishes to avoid the penalty imposed under this section must make an affirmative showing of all facts alleged as a reasonable cause for the person's failure to file the return, pay the amount of tax shown on the person's return, pay the deficiency, or timely remit tax held in trust, in a written statement containing a declaration that the statement is made under penalty of perjury. The statement must be filed with the return or payment within the time prescribed for protesting departmental assessments. A taxpayer may also avoid the penalty imposed under this section by obtaining a ruling from the department before the end of a particular tax period on the amount of tax due for that tax period.

....

(Emphasis added).

Taxpayer states that it acted reasonably and believes that it meets the requirements of IC § 6-8.1-10-2.1(d). Taxpayer raises the point that it remitted its monthly withholding taxes by check and that the Department received all of the taxes due in a timely manner. Also, Taxpayer states that the Department sent notice of the requirement to one of Taxpayer's addresses other than its payroll department's address. Taxpayer considers that this constitutes insufficient notice to adequately inform it of the EFT requirement. Taxpayer has not referred to any statute, regulation, or court case that requires the Department to notify a specific person or department at a given taxpayer in order to constitute sufficient notice. Neither has Taxpayer referred to any requirement that the Department specifically notify individual taxpayers of upcoming filing requirements.

The Department refers to [45 IAC 15-11-2\(b\)](#), which states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

(Emphasis added).

Therefore, all taxpayers are required to know the listed tax laws, rules, and regulations regarding Indiana state taxation. The Department's notice of the filing requirements under IC § 6-3-4-8.1 was a courtesy intended to aid taxpayers in general, and Taxpayer specifically, in proper compliance with Indiana's filing requirements. While the notice may not have gone directly to Taxpayer's payroll department, it did go to Taxpayer. Also, Taxpayer's withholding responsibilities were handled by a national payroll company. That company had ongoing contacts with the Department and was also aware of the IC § 6-3-4-8.1 filing requirements, as provided by [45 IAC 15-11-2\(b\)](#).

In conclusion, Taxpayer was subject to the filing requirements found at IC § 6-3-4-8.1. Taxpayer did not follow the procedures provided by IC § 6-3-4-8.1. The company handling Taxpayer's payroll did not follow the procedures provided by IC § 6-3-4-8.1. The Department is not required to specifically notify individual taxpayers of filing requirements. Instead, taxpayers are required to know and follow Indiana's listed tax laws, rules and/or regulations, as explained by [45 IAC 15-11-2\(b\)](#). Taxpayer has not met the burden of proving the proposed assessments wrong, as required by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is denied.

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